

1-1-1988

Death Penalty Appeals in California

Robert Weisberg

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Robert Weisberg, Symposium, *Death Penalty Appeals in California*, 28 SANTA CLARA L. REV. 243 (1988).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol28/iss2/2>

This Symposium is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

CALIFORNIA SUPREME COURT CONFERENCE, SANTA CLARA, CALIFORNIA, OCTOBER 10, 1987

I. DEATH PENALTY APPEALS IN CALIFORNIA

A. Essay — *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California*

Robert Weisberg*

I. INTRODUCTION

Whatever their position about the 1986 judicial election, most people involved with the California judicial system are probably exhausted by the intense political struggle over the Bird court, and would like to simply spend some time in adjustment and observation as the Lucas court begins its work. But a new round of political debate about the California Supreme Court in general, and its death penalty work in particular, now confronts us in the form of new proposals to reshape the court. Perhaps the fall of the Bird court will (or should) moot the political intensity underlying these proposals. Or perhaps these proposals truly address fundamental structural problems in our judicial system that are independent of last year's political controversies. In any event, legislators, judges, and others have continued arguments, begun before the 1986 election, for restructuring of the docket or jurisdiction of the supreme court.¹

Of specific concern here is the argument for a change in the scheme for handling death penalty appeals. The current scheme guarantees a condemned murderer a direct and automatic appeal of any death sentence (and his conviction) from the superior court to

© 1988 by Robert Weisberg

* Professor of Law, Stanford University; B.A., 1966, City College of New York; Ph.D., 1971, Harvard; J.D., 1979, Stanford University. The writing of this paper was supported by the Stanford Legal Research Fund, made possible by a bequest from Ira S. Lillick and by gifts from other friends of Stanford Law School. My thanks also go to Edward Cohen, Counsel for the Joint Committee for Revision of the Penal Code, for his help in supplying research materials.

1. For publicity on earlier proposals, see the L.A. Daily J., Nov. 10, 1983, at 1, col. 6, and Nov. 22, 1983, at 1, col. 6. For a post-election statement by Chief Justice Lucas, see the L.A. Daily J., March 20, 1987, at 1, col. 2.

the California Supreme Court, bypassing the court of appeal as well as the supreme court's normal discretionary power to grant or deny petitions for hearing.² Proposals for changing the current system have been numerous and include the following:

(a) A defendant sentenced to death would have an automatic appeal of both his conviction and death sentence to the court of appeal having jurisdiction over the local superior court. If the court of appeal affirms both the conviction and the death sentence, the entire case will then automatically be appealed to the supreme court. Under this scheme, the prosecution presumably would retain the normal right of a losing party to file a conventional petition for hearing in the supreme court to review a court of appeal judgment reversing the death sentence or the conviction.³

(b) A defendant sentenced to death would still have an automatic appeal of both conviction and sentence to the court of appeal, but if the court of appeal affirms both the conviction and sentence, the defendant would be treated like any other losing appellant: he would have to file a petition for hearing with the supreme court, and the court would have unreviewable discretion as to whether to hear the case.⁴

(c) The Legislature would create a special new branch of the court of appeal. This court, first conceived by Mr. Bernard Witkin, would automatically take all appeals of death sentences.⁵ Under the fullest articulation of this proposal,⁶ the court would have five judges, all drawn from currently sitting justices of the court of appeal during their otherwise regular terms. They would be appointed by the Governor to four year terms, subject to confirmation by the Commission on Judicial Appointments, with special assignments

2. CAL. CONST. art. VI, § 11 (1954, amended 1966); CAL. R. CT. 29(a).

3. This is the essence of former S.B. 738 (1987 Cal. Legis. Serv. 234 (West)) and State Bar of California, Conference of Delegates Binder, Sub. Reso. 3-1-86 (1986), which, however, do not address the issue of prosecution appeal, and so may assume the prosecution would retain that power as would any losing litigant in the court of appeal.

4. This is the essence of S.C.A. No. 4, of the 1987-88 Regular Session and S.C.A. No. 18, of the 1987-88 Regular Session. The initial version of State Bar Resolution 3-1-86, old S.B. 45, and the recommendation of the San Diego Bar Association.

5. This was embodied in S.B. No. 174 of the 1987-88 Regular Session, which would call the court the Special Court of Appeals, as well as an alternate suggestion of the San Diego Bar Association, which would call it the Court of Criminal Appeals for Capital Convictions (Appellate Court Committee of the San Diego Bar Association, Committee Report: A Response to George Nicholson's Request for Input Regarding Justice Stanley Mosk's Suggestion To Bifurcate the Functions of the California Supreme Court (Jan. 24, 1984)) [hereinafter CCACC].

6. See S.C.A. No. 3 (Reg. Sess. 1987-88); S.B. No. 174 (Reg. Sess. 1987-88). Their appointment would not create any vacancies on the court of appeal.

made by the concurrence of the Chief Justice and the two most senior justices of the supreme court. The current duties of the supreme court in death penalty cases would be transferred to this Special Court of Appeals. The supreme court could review any decision of the Special Court of Appeals (presumably on a petition for hearing by either party) or could have a case transferred to it by that court. In an alternate version, any affirmance of a death sentence by the Special Court of Appeals would be automatically appealed to the supreme court.

These three proposals do not exhaust the potential range of new schemes for death penalty appeals. Briefly, other possibilities include:

A. Let the court of appeal hear all non-penalty issues in death cases, with appeal of penalty phase issues to the supreme court only if the court of appeal affirms the conviction.

B. Continue the current practice of direct appeal to the supreme court, but allow the supreme court to transfer cases back to the court of appeal for review of selected fact-specific or non-penalty issues.

C. Create a new Special Court of Appeals for capital cases, but solely for review of noncapital issues.

II. BACKGROUND

A. *Delay and Backlog Assumptions*

1. *The Premises of the Argument*

What has been sparking all these proposals? Stripped of political interest to the extent possible, the reason is simply that the California Supreme Court is overwhelmed by death penalty cases. Currently, the court has too little time to decide important civil cases, and the backlog of death penalty cases has created an intolerable delay in their adjudication.

However, we should note that in a sense there is no such thing as a politically disinterested version of these arguments. Insufficient time for civil cases is itself a political argument. Some may argue that death cases represent the strongest form of legal action any entity can take against a citizen and therefore deserve a huge proportion of the highest court's time.⁷

Even more obviously, arguments about delay are politically

7. The issue may have subtler political effects as well. Liberal groups who often end up as plaintiffs in noncriminal civil rights cases may also be frustrated by the diversion of supreme court energy into capital cases.

loaded because some people, usually defendants, benefit from delay. Quicker adjudication may not be as thorough and fair as the protracted adjudication witnessed in the last decade. Moreover, delay in death penalty cases usually results from the irreducible demands of the federal due process explosion of the Warren Court and of contemporary eighth amendment doctrine. Nevertheless, the delay and backlog arguments provide the major impetus for these proposals. Indeed, similar arguments in the past two decades have spurred the more general movement for establishing intermediate appellate courts of general jurisdiction to relieve the burdens on state supreme courts.⁸

At any one time, the supreme court faces about 150 death cases. Before the 1986 judicial election, the media published horror stories about this backlog, reporting that some cases might take twenty-five years to resolve and that even if the supreme court never took another death case and decided nothing but death cases it would not clear its docket until the next century.⁹ Below, I briefly note some of the problems with this backlog argument. However, I shall later assume that there is a backlog problem and examine the various proposals aimed at solving that problem.

B. *Some Facts about Delay and Backlog*

As of March 24, 1987, the supreme court had a docket of 144 death judgments: In twenty-seven, the record had not yet been certified and filed. In ten, the record had been filed but the appellant's opening brief had not. In sixteen, the briefing had begun, but was not completed. In fifty-two, the briefing was done but argument awaited. In thirty-seven, argument was over but the case awaited decision. Lastly, two cases awaited rehearing.¹⁰

To put these facts into perspective, we first have to recognize that backlog and delay are very different, if related, phenomena. Many people assume backlog and delay are causally related, but the facts and the institutional sociology belie this assumption. For example, in almost all capital cases, the most notable contributor to delay between initial conviction and a final decision by the supreme court

8. See generally Wasby, *Appellate Delay: An Examination of Possible Remedies*, 6 JUST. SYS. J. 325 (1981).

9. See Sen. Maddy, News Release (Jan. 11, 1984).

10. Judicial Council of California, Administrative Office of the Courts, Statistical Report (July 27, 1987) (on file at the Santa Clara Law Review office) [hereinafter Council Report].

is the time spent settling and correcting the trial court record.¹¹ In the first post-sentence phase of a capital appeal, the appellate attorney, who is most often not the trial attorney, and whose appointment itself may postpone the beginning of the appeal process by several months, must first take charge of the case.

The attorney must laboriously read the entire reporter's transcript, clerk's transcript, and assorted exhibit material. He must detect errors, omissions, and discrepancies, and consult and propose solutions with the prosecutor, the trial defense lawyer, the superior court clerk, and possibly even witnesses. He may also have to arrange to examine exhibit material excluded from the record. He will then have to negotiate corrections or augmentations of the record with the prosecution, and, in effect, litigate any further changes before the trial court. Even when record matters are settled, the trial court clerk must enter the changes and submit them back to the lawyers for confirmation until, finally, the trial judge can certify the completed record to the supreme court. The average time for this phase is over two years while, for example, the time between the last brief filing and oral argument is less than ten months and the average time between oral argument and issuance of an opinion is less than a year.¹²

This first long phase obviously has its own causes, the most obvious of which is the sheer length of these records. The average total record length is about 6,000 pages, but many records run to 20,000 pages or more.¹³ Of course, the record length and delay may be independently curable. Lawyers and clerks correcting the record might be forced to act faster. Moreover, if the supreme court ultimately affirms more cases, doctrinal changes might reduce the number of litigable issues at trial and hence the length of the record. Nevertheless, in a sense, this record correction phase is a source of delay which cannot be attributed to backlog in the supreme court, and is not really a delay in the supreme court at all. If we define the supreme court's work as beginning with its receipt of the certified record, the court has been doing its work in about two years¹⁴ — a long, but not horribly long, time. Thus, significant delay in appellate resolution of death cases may not be resolved by simply shifting cases to the court of appeal.

11. *Id.*; see also CAL. R. CT. 35, 39.

12. See Council Report, *supra* note 10. More updated figures, but based on sketchier recent data, suggest that the numbers may be 20.2, 16.2, 8.4. months, respectively. *Id.*

13. Council Report, *supra*, note 10.

14. Council Report, *supra*, note 10.

Rather, an answer to delay in appellate review lies in finding a means to hasten record correction without hampering the work of appellate counsel.

Assuming that appellate counsel could process the record significantly faster without jeopardizing advocacy, the supreme court would have to impose some pressure on counsel to in fact act swiftly. The court presently does not monitor the record correction process very closely. And, although the California Rules of Court impose a deadline for submission of proposed record corrections, that deadline is loosely enforced and in any event does not explicitly address the negotiation and resolution phase of the process.¹⁵

C. *Reducing Delay Through the Court of Appeal*

It is possible that the supreme court would monitor lawyers and clerks more closely if it had more time to do so. If so, shifting cases in at least some preliminary way to the court of appeal might indeed give the court the needed time and thereby speed things up. Even if the courts of appeal were no less effective than the supreme court in pushing lawyers for faster record correction, the time savings might be considerable. The courts of appeal would have easier physical access to local lawyers and clerks, and of course would have fewer death records to monitor per appellate justice. In fact, courts of appeal are unusually vigorous and even aggressive in compelling local lawyers to deliver records and briefs on time.

D. *Disentangling Delay and Backlog*

A different angle on the delay-backlog problem does not focus on any particular stage in appellate litigation, but instead questions whether there is indeed positive correlation between backlog and delay. The burgeoning sociological and empirical literature on appellate courts counsels some skepticism about any such correlation between caseload and disposition time. The best analogy lies with the mysterious world of plea bargaining. Observers of criminal justice systems often assume that prosecutors and courts participate in plea bargaining because caseload pressure prohibits them from fully litigating all the cases they otherwise would wish to litigate. Recent studies, however, have cast doubt on the positive correlation between caseload and plea bargaining rates, and the sociological literature has

15. See CAL. R. CT. 35, 39.

begun to step in with some explanations.¹⁶ Sometimes, high rates of plea bargaining are due to matters of local norm and culture, bureaucratic inefficiency, and the individual personalities and preferences of lawyers, judges, and bureaucrats, independent of caseload pressure. In the last decade, parallel literature has offered explanations of disposition time in appellate courts in relation to the amount of work actually processed.¹⁷

There may be other reasons to think the overall appellate process for capital cases will hasten without any legislative restructuring. The process would have sped up even under a continuing Bird court, since the "shakedown" period for resolving some of the worst problems created by the Briggs Initiative is coming to an end.¹⁸ And it seems especially unwise to make a categorical decision about backlog and delay just as the new Lucas court begins its work. Doubtless the new court will examine cases as carefully as the Bird court, but if new affirmances settle many new legal issues against defendants and reduce the standard range of claims in appeal,¹⁹ the backlog might begin to resolve itself.²⁰

16. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

17. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43 (1982); Martin & Prescott, *The Magnitude and Sources of Delay in Ten State Appellate Courts*, 6 JUST. SYS. J. 305, 315 (1981).

18. The greatest problems, and sources of appellate litigation, have been constitutional difficulties in the Briggs Initiative concerning the law's intent-to-kill requirement, *see* Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983) authorized warning to penalty-phase jurors that the Governor could commute a sentence of life without parole to a simple life sentence, *see* People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982).

19. The supreme court's recent decision in People v. Ghent, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), reads like a repeal of half the tables of contents of recent appellants' brief in capital cases.

20. Of course, the possibility that any new appellate scheme will significantly reduce the supreme court's backlog depends to some extent on whether new legislation will apply retroactively. The retroactivity problem may pose an important general issue in assessing the various proposals for changing death penalty appeals. My sense is that despite some fairly fuzzy case law on the subject, there is probably no firm constitutional bar to subjecting already-sentenced defendants to any new appellate scheme, so long as the new legislation does not otherwise alter the substantive law of capital murder.

The most important recent case, *Dobbert v. Florida*, 432 U.S. 282 (1977), also casts doubt on any retroactivity challenge to a new appellate scheme. *Dobbert* made two *ex post facto* challenges to his death sentence. When he committed the crime, the Florida death statute made death the presumed penalty for capital murder, subject to reduction to life sentence if a majority of the jury so voted. That statute was declared unconstitutional under *Furman v. Georgia*, 408 U.S. 238 (1972), and *Dobbert* was then tried and convicted under the new statute later upheld in *Proffitt v. Florida*, 428 U.S. 242 (1976). That statute is a fairly typical guided discretion statute, under which the jury makes an advisory life-death decision after the penalty phase, and its decision is then reviewed by the judge, who is to reverse a jury recommendation of life only where the life recommendation "is clearly and convincingly unreasonable."

Of course, a counter-trend might also result. If the supreme court begins affirming cases in great numbers, it might thereby imbue prosecutors with new confidence in their ability to win death cases and thus encourage them to file more special circumstance charges. This possibility is supported in reverse by the decline in death filings and judgments in California between 1982 and 1987,²¹ arguably due to prosecutors' perceptions that they faced a losing battle against the Bird court. If there is some irreducible minimum length and complexity to a death penalty appeal, the result could be an increased supreme court backlog. Nevertheless, the sensible conservative approach may well be to avoid drastic and expensive legislative changes for at least a while to see if non-legislative factors alleviate the problem on their own.

Further, because we have had so few affirmances in California, we have virtually no experience with how the federal courts in the ninth circuit will treat California death judgments. Part of the "delay problem" is the simple public perception of delay, the public is worried about delay *per se*, not delay in any one court. It may well be that there is an inverse correlation between the time state appellate courts and federal habeas courts spend on capital cases, since federal habeas courts may review cases more thoroughly where they

ble." Dobbert argued first, that this change itself was impermissibly *ex post facto* and second, since the whole Florida law in effect at the time of the crime was later judged constitutionally void, that he was convicted of a capital crime which did not legally exist until after he committed it.

The court's decision is two-fold. First it seems to take the *per se* approach that the *ex post facto* clause is irrelevant to a procedural change which does not on its face alter the definition of the crime, the prescribed punishment, or the degree of proof necessary to convict. But the court also takes a functional approach, asking whether even a procedural change increases the possibility of a death sentence. This question is obviously terribly speculative, but the court seems to put the burden of uncertainty on the defendant. In Dobbert's case, though under the old law a jury vote for life could not be reviewed, the court saw the counter-balancing facts that under the new law, death was not presumed, that the statute makes rejection of a life recommendation difficult, and that in general Dobbert had all the approved eighth amendment due process protections enunciated in *Gregg v. Georgia*, 428 U.S. 153 (1976), which were unavailable under the old statute. Finally, on the second claim, the court held that even though the old statute later proved void, it was operative at the time of the crime to give Dobbert fair notice that his actions could get him the death penalty.

The best inference from these cases is that neither Proposition A nor Proposition C presents a serious *ex post facto* problem. Of Proposition B, which would remove a guarantee of ultimate appeal to the supreme court, one cannot be quite so sure. One compromise solution under Proposition B would be to make plenary supreme court review mandatory for all crimes committed before date of enactment only after affirmance by the court of appeal.

21. The number rose from twenty in 1979 to a peak of forty in 1981, and has declined to fewer than thirty per year since. See Council Report, *supra* note 10.

fear the state courts do not.²² Finally, the actual rate of death sentencing, possibly connected with the demographics of the baby boom, has begun to slow in California, so the rate of increase in backlog has slowed.²³

Beyond examining the immediate political (and economic) grounds for the new proposals, it is helpful to frame the discussion with several other backgrounds, in order to temper some of the excess tinkering that tends to occur with such legal process proposals.

E. *Some Constitutional Concerns*

If the overall theme of American death penalty jurisprudence has been that "death is different," that theme is especially true for appellate schemes. In California, the supreme court has always had direct appellate jurisdiction over death cases. Until 1904, the supreme court had sole appellate jurisdiction over all felonies.²⁴ The court of appeal was created in 1904, but death cases were excluded from the court's criminal appellate jurisdiction.²⁵ That special jurisdiction has survived for eighty-four years and numerous statutory changes, including the 1966 statutory revision of the supreme court's jurisdiction that otherwise eliminated the supreme court's direct jurisdiction over superior court cases.²⁶ Moreover, the pattern of direct and automatic appeal of death cases to the state's highest appellate court is virtually the unanimous pattern among the states. Of thirty-six states with currently operative death penalty laws, thirty-one essentially provide for direct appeal, mandatory, or as of right, of both conviction and death sentence to the state's highest general appellate court.²⁷ One other, Louisiana, provides mandatory and direct appeal of the death sentence.²⁸ Two others, Texas and Oklahoma, provide for direct mandatory appeal to the Special Court of Criminal Appeals that otherwise sits as the state's highest court for criminal cases.²⁹ Only two states, Ohio and Alabama, route death cases

22. For a discussion of the Ohio experience, see *infra* note 62 and accompanying text.

23. See *supra* note 21.

24. See Comment, *Case Dispositions by the California Supreme Court*, 67 CALIF. L. REV. 788, 793 (1979).

25. *Id.*

26. See generally CAL. CONST. art. VI; CALIFORNIA CONSTITUTIONAL REVISION COMMISSION, 1966 Report, at 90-91.

27. Judicial Council of California, Report on Jurisdiction of Appeals in Death Penalty Cases (July 23, 1987) (on file at the Santa Clara Law Review office).

28. LA. CODE CRIM. PROC. ANN., art. 905.9, 912.1(A) (West 1984 & Supp. 1988); LA. CONST. art. 5, § 5(D).

29. TEX. CRIM. PROC. CODE art. 37.071(f) (Vernon 1981); OKLA. STAT. ANN., tit. 21, § 701.13 (West 1983).

through intermediate courts of appeal before sending them to the states' supreme courts, and both of those states then guarantee losing appellants an appeal of death affirmances to the supreme court.³⁰

Though the history of special treatment for death cases in other states is probably similar to that in California, a major impetus for special appellate treatment of capital cases is one of the strong, if ambiguously derived, principles of the so-called "Eighth Amendment Due Process," which the United States Supreme Court has invoked since its major foray into capital punishment in *Furman v. Georgia*³¹ sixteen years ago. When *Furman* suspended the death penalty in the United States, the unifying theme of many fractured opinions was that the typical death penalty schemes then in force in the United States produced impermissible results of two sorts. First, "arbitrary and capricious" decisions resulted in an inexplicable pattern of distribution of life and death sentences. Second, decisions influenced by the race of the defendant or victim resulted in an explicable, and most constitutionally impermissible, distribution.³² Though *Furman* itself did not establish specific criteria for constitutionally satisfactory death statutes, the case implied that some sort of centralized monitoring of death sentences might prevent such results.

That implication was noted in 1976 by the key case for our purposes and for modern capital punishment generally. In *Gregg v. Georgia*,³³ the Court upheld the modern form of death penalty statutes: the "guided discretion" form based largely on the example of the Model Penal Code. The jurisprudence of *Gregg* is a curious matter. When *Gregg* described the Georgia statute it was upholding (the same was true for the Florida law in *Proffitt v. Florida*³⁴ and the Texas law in *Jurek*³⁵), the plurality carefully delineated the elements of the new statute which seemed, on their face, well designed to prevent the evils of the old system denounced in *Furman*. Prominent among these elements were the statutory guidelines for measuring the aggravating and mitigating circumstances of the crime or offense, and provisions ensuring appeal of any death conviction and sentence to the state's highest court.³⁶ The *Gregg* Court made clear

30. See *infra* notes 57-66 and accompanying text.

31. 408 U.S. 238 (1972).

32. Weisberg, *Deregulating Death*, SUP. CT. REV. 305, 314-18 (1983).

33. 428 U.S. 153 (1976).

34. 428 U.S. 242 (1976).

35. *Jurek v. Texas*, 428 U.S. 262 (1976).

36. *Gregg*, 428 U.S. at 189-93.

that the latter provision was well-designed to monitor the pattern of death judgments in the state and to prevent arbitrary and racist results.

What *Gregg* left unclear, however, was whether it was *requiring* appeal to the state's highest court, or any of the other approved elements of the Georgia statute. Later case law suggests it was not requiring anything in particular. However, the strongest implication that could be gained from *Gregg* was that the Court was requiring not only direct mandatory appeals, but also direct appeals in a form precisely designed to maximize the advantages of such a structure: a requirement that the state's highest court perform a formal "horizontal equity" or "proportionality" review among death and life sentence cases in the state.³⁷ That argument lost in *Pulley v. Harris*³⁸ however, where the Court held that no formal proportionality review was required. *Pulley*, nonetheless, seemed to reaffirm the Court's general preference for some sort of guaranteed appellate review.³⁹

The constitutional consequence of all this is that the United States Supreme Court may require relatively little in the way of appellate procedure in death cases, beyond some appeal of right to some court. It remains unclear whether the Court would strike down a state law that did not guarantee at least an ultimate appeal, if not direct appeal, to the state's highest criminal court. The Court might hold that even discretionary review would be sufficient if it provided a demonstrable *opportunity* for proportionality review. There remains, though, the risk that at least on symbolic grounds, tinkering with the unique appellate structure for death cases may arouse some constitutional concern.⁴⁰

F. *Some Jurisprudential Concerns*

It is also worthwhile to briefly explore a more general matter of jurisprudence. Discussions about the death penalty appeals process often focus on the alteration of the legal process while avoiding fundamental, and controversial, political issues. It is an unspoken premise of this symposium that we can find some common goals for our

37. See Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786 (1983).

38. 465 U.S. 37 (1984).

39. *Id.* at 45, 49.

40. On the other hand, the United States Supreme Court had also praised the new guided discretion statutes for providing significant due process rights in the penalty phase of capital trials, but ultimately held that the defendant has no constitutional right to a jury trial on the penalty issue. *Spaziano v. Florida*, 468 U.S. 447 (1984).

experiments in judicial tinkering — efficient allocation of resources, thorough review of important issues, preventing arbitrary or disproportionate results — without having to confront what would doubtless be very divisive differences in our moral, political, and even concretely legal beliefs about capital punishment. This traditional problem derives from the 1950's world of legal process jurisprudence. As Professor Laurence Tribe once asked rhetorically: "[W]hy do thoughtful judges and scholars continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values from the realm of constitutional discourse by relegating those controversies to the unruly world of power?"⁴¹

The simple fact is that changing the appellate structure may cause more (or, somewhat theoretically, fewer) death sentences or executions than would arise under the current direct appeals scheme. Moreover, it is very likely that some people taking strong stands on appellate reform do so because they believe their proposed reforms will change the rate of execution of sentencing. However, not many advance changes in rates of sentencing or execution as a benefit — or drawback — of reform. Most act upon an unstated premise that structural changes will be "death-neutral." In that sense, we may be engaged in some academic shadow-boxing.

I can think of only one way we might respectably bring sentencing or execution rates into the discussion. We might be able to develop a consensus on the appropriate number of executions California should have every year. Obviously, those among us who strongly oppose capital punishment would set the number at zero, while those who fervently support it might set the number equal to the number of convicted first-degree murderers. Anyone who holds either view must essentially suspend it in order to participate in this discussion with any intellectual coherence. The premise must be that we have a constitutional death penalty law in California, and that there should be *some* executions, but that only a fraction of convicted first-degree murderers should suffer execution.

Thus, if a change in the appellate structure were necessary to change the number of executions, we might recognize the positive correlation between a certain structure and the number of ultimate executions as a respectable argument in favor of structural change. That, of course, is not saying much. It may be unnecessary to change

41. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064-65 (1980).

the appellate structure to change our execution rate from zero to a positive number. Moreover, we then still must ask which number of executions is proper, and it would seem very unlikely that we could make a nonpolitical judgment on that score. It would be interesting to pursue such a nonpolitical judgment: Could we stipulate the purported instrumental social and political purposes of capital punishment and agree on the minimum number of executions needed to carry out those goals without then incurring the social costs of having more executions than we need?⁴² Is there an optimal number of executions we need just to keep the art form alive? I obviously will not pursue this issue further here, but I hope I have introduced some critical caution into the debate.

G. *The Ghost of the NCA*

There is one more background issue — a historical analogy to the political and jurisprudential background issues discussed above. Though in recent years we have seen some reasonable and successful state court experiments with creating or expanding the role of intermediate appellate courts, the single most discussed experiment in recent judicial history is a case study in futility. I speak of the perennial proposal to create a National Court of Appeals to relieve the United States Supreme Court of some of its burden of certiorari screening. This analogy bears more on the next set of issues we will hear about today, but it bears on capital punishment cases as well.

There were various versions of the National Court of Appeals' proposal, but the gist was this: The NCA would screen all certiorari petitions.⁴³ In federal statutory cases, it would screen out the large numbers of cases representing no split in the circuits. Where it did discern a true split in the circuits, the NCA would resolve the ones involving relatively unimportant issues. The proposals varied in terms of the appealability of NCA decisions, but generally, NCA denials of review would be less appealable than decisions on the merits, and in any event the Supreme Court would retain preemptive certiorari power.⁴⁴

42. Weisberg, *supra* note 32, at 386-87.

43. See generally Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974).

44. Under some versions, denial of review by NCA might be unappealable, as might adjudication on merits. See Alsup, *supra* note 43, at 1319. Other alternatives included a special national division of the United States Court of Appeals appointed by the United States Supreme Court, to exercise merely advisory power. Its decisions would only become final if the

The proposal met a great deal of criticism, including empirical skepticism about the severity of the overload problem; economic skepticism about the true efficiency gains of adding a supposedly time-saving layer of bureaucracy; doubts about the system's ability to draw coherent distinctions between, for example, important and unimportant circuit-split cases; the danger that the Supreme Court would become not *relieved*, but *deprived* of the sort of sociological experience afforded by exposure to the great range of petitions; suggestions that the problems could be more easily solved by such undramatic measures as increasing the number of law clerks;⁴⁵ and fears that important legal art forms would disappear, such as the influential dissent from denial of certiorari.⁴⁶

Skepticism surrounding the NCA confirms one basic insight, and the death penalty presents the most urgent version of that insight: it is almost impossible to relieve an institution of a logistical burden associated with its major moral and legal responsibility without depriving or relieving it of its major moral and legal responsibility.

III. SPECIFIC PROPOSALS AND SPECIFIC ARGUMENTS

A. *Proposal A*

The proposal to have guaranteed double appeal is perhaps the most interesting and promising one, and, like the others, must be examined from several overlapping perspectives; how will it affect the courts of appeal, how will it affect the Supreme Court, and ultimately, how will it affect the cases?

Proposal A will, of course, have a disproportionate geographical effect by county, since between a third and a half of all death cases arise in Los Angeles County.⁴⁷ Obviously, it will increase the caseload pressure on some courts of appeal. On the other hand, it will not hit the courts of appeal like an avalanche, since, given the

Supreme Court did not act after a specified time. See Alsup, *supra* note 43, at 1342-46.

45. Ironically, in 1973, the California Supreme Court's professional senior staff was cited as a model of efficiency for processing petitions for hearing or certiorari. Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846, 849-50 (1973).

46. Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill-Advised,"* 59 A.B.A.J. 835 (1973). Justice Brennan attacked as unsupportable the assumption that the Supreme Court was unable to give proper consideration to cases. He argued that many lower court federal judges were at least as overworked as the justices. He also argued that screening *certiorari* cases was so crucial a part of a Justice's responsibility that he himself resisted delegating it to his law clerks.

47. Council Report, *supra* note 10. District 2 cases can still be distributed among judges in Ventura, Santa Barbara, and San Luis Obispo counties.

protracted and complex series of steps a capital case passes through,⁴⁸ the impact on the courts would be gradual, as cases feed into the system sequentially.

The initial pressure may not be so much on the judges in their decisional caseload as on the administrative aspect of the courts. The courts may have to add clerks and research staff to monitor record correction.⁴⁹ Perhaps more important is the problem of appointment and compensation of appellate counsel. Right now, the California Appellate Project (CAP) and the State Public Defender's Office have worked out a very thorough and efficient system of appointment, supervision, and payment of appointed counsel. A new system or set of systems may have to be introduced for the courts of appeal. The costs of doing so may demonstrate the great value of pure inertia.

Problems could prove more than bureaucratic. If decentralized appointment or monitoring proves less rigorous than the current centralized system, we may face problems of ineffective appellate counsel — some real, some litigated in later federal habeas proceedings, and some both.⁵⁰ Of course, once a system of district-wide appointment were in place, it might prove even more efficient than the current CAP system, since local District Administrators might be better able to evaluate the skills of local lawyers applying for appointment. But in any event, there is always some irreducible cost associated with mundane but unavoidable administrative matters such as deadlines for brief filings, and so on.

Of course, at this point I may appear to be evading the most important effect of distributing capital appellate jurisdiction among the courts of appeal — the possibility of nonuniform treatment of death cases. But to avoid repetition, I would like to postpone that issue until I reach Proposal B, below. The problem will be more exacerbated under Proposal B, which would not guarantee supreme court review of an affirmed death sentence, and would thus deny the defendant a guaranteed check on the arbitrary conduct of the particular appellate panel he draws.

The problem will exist, though to a lesser degree and in a somewhat different form, even under Proposal A. Defendants who

48. See *supra* text accompanying note 10.

49. Recently, increased staff in the California Supreme Court has been dedicated to assisting in screening petitions for hearing.

50. See *Evitts v. Lucey*, 469 U.S. 387 (1985) (confirming sixth amendment right to effective assistance of counsel on first appeal as of right). The supreme court or Legislature would also have to face the issue of whether counsel's appointment in the court of appeal automatically, or obligatorily, continues to the supreme court.

hypothetically draw arbitrarily "easy" panels will get their death sentences reversed, and those who draw arbitrarily "hard" panels will be guaranteed supreme court review. This asymmetry, however, will not eliminate the systemic problem of the random draw, of course, since defendants whose death sentences are affirmed by both the court of appeal and by the supreme court can still claim horizontal inequity because they did not have the chance to escape death earlier from an arbitrarily "easy" panel, assuming the supreme court would not, in their cases, have granted a prosecutor's petition for hearing. This is still, however, a much subtler "lottery" claim,⁵¹ and thus the general issue is best discussed below in its more dramatic form.

What benefits would Proposal A achieve for the supreme court, and for the quality of appellate review? The net result of this proposal, of course, would be an *overall increase* in the *amount* of appellate litigation. The benefits might be a decrease in the workload of the supreme court and a decrease in delay in at least those cases that would go no further than the court of appeal. So the balance of benefit depends on the statutory rules for subsequent appeals.

Let us assume that the defendant retains an automatic right to supreme court review if the court of appeal affirms both conviction and death sentence. Presumably, the state would not have an automatic right to appeal a reversal to the supreme court, so the major saving would be in those cases that the supreme court would never be required to hear. Of course, the prosecution might at least retain the normal right to petition for a hearing in those cases. We might assume the supreme court would follow its normal standards for noncapital cases and grant the People a hearing only if the appeal rests on an important and distinctly legal question (especially one dividing the districts).⁵² We might also assume that the People's chances for winning a supreme court hearing would be at least as good in death cases as it is generally for non-capital criminal convictions reversed by the court of appeal. If so, the supreme court would still spend at least *some* time on almost all death all cases if the People frequently seek review of reversals.

The petition-screening on prosecution appeals need not include the time-consuming problem of record review when the sole ground

51. For an argument that no one who, by himself, merits the death penalty can legitimately claim unfairness just because other, equally culpable or heinous killers escape the death penalty, see E. VAN DEN HAAG, *THE DEATH PENALTY: A DEBATE* (with John Conrad) (1983).

52. CAL. R. CT. 29(a).

for a grant is a clear legal error on a major point of law. On the other hand, the court would have to examine even non-appealed cases reversed by the court of appeal with a modicum of factual scrutiny, simply to preserve an opportunity to conduct some sort of horizontal proportionality review. Though much of this work could be done in the form of research staff summaries, even minimal horizontal equity review must include cases where no final death sentence is imposed.⁵³

In any event, the time savings would depend on the relative rates of affirmance and reversal. Where the court of appeal affirms the conviction and sentence, there would be a net increase in appellate litigation. It would probably be less than a doubling, since the record correction would have been done once and for all, and also perhaps because the court of appeal opinion might serve as a sort of issue-sharpening bench memo for the supreme court, reducing attorney briefing. But if the supreme court expends the typical great energy reviewing death sentences, it will still be doing something akin to a *de novo* review of the issues. If the review is indeed *de novo* and if appeal is automatic, then little has been accomplished by court of appeal review except for a modest decentralization of the bureaucratic phases of the case.⁵⁴

The fundamental question is this: If the supreme court does not perform the thorough *de novo* review of capital convictions and death sentences it currently performs, how do we define its special role in death cases? The obvious answer might be to allow the court of appeal to decide fact-specific applications of settled constitutional or statutory law, while retaining for the supreme court sole responsibility for discerning serious and distinctly legal errors. The problem with that "obvious" answer is also obvious: If we so limit the supreme court's role, we eviscerate the key point of Proposal A — the defendant's guaranteed right of appeal from the court of appeal — since the distinction between fact-specific and more legally significant claims will come close to collapsing back into the discretionary standards for petitions for hearing.⁵⁵

53. See generally Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980).

54. There are sub-alternatives within this scheme: The supreme court might limit its intervention where the court of appeal certifies that there are important issues of law that are not overly fact-specific. It is also theoretically possible to limit supreme court review to penalty phase issues, but the distinction between death and conviction issues is very blurry on such claims as ineffective assistance of counsel or evidentiary issues concerning prior crimes that are wrongly introduced to the jury.

55. See *infra* note 62 and accompanying text for a discussion of the Ohio experience.

Another alternative to full *de novo* review comes to mind as a *supplement* to the review for serious legal error described above. The supreme court could be instructed to abjure its role of scrutinizer of the details of entire criminal cases, while still retaining a unique role in death cases that requires special sensitivity to the factual subtleties of death cases. The court could play the role of final moral judge of the propriety of the death sentence for the specific defendant and his specific crime and character: Having left fact-specific legal issues to the court of appeal, and having decided that the case presents no large issues of legal error, it might take one last look at the case — not the criminal procedure claims, but the raw, morally relevant facts of aggravation and mitigation — and reverse the death sentence if it finds it morally disproportionate. In effect, the court would play its symbolically significant role as final arbiter of the moral desert of the defendant. If that function seems to ascribe to the court the clemency-granting role we normally associate with the Governor, this may be perfectly appropriate. Current law requires the recommendation of the supreme court in a grant of clemency or commutation to any twice-convicted felon.⁵⁶ This version of Proposal A would simply broaden and accelerate that review.

B. *The Alabama and Ohio Experiences*

Roughly similar systems have been in place for several years in Alabama and Ohio. However, even if we assume comparison among such legally and politically disparate jurisdictions makes sense, the data from these states is not very illuminating. Moreover, we cannot make that assumption very safely in any event, since we would have to account for such interstate variables as the murder rate, the behavior of prosecutors and juries, the substantive capital murder law, the doctrinal behavior of the state appellate courts, and the role of the federal habeas courts with jurisdiction over those states.

In Alabama before 1969, all criminal cases in which the defendant suffered a sentence of twenty years or more was appealed directly to the state supreme court.⁵⁷ The system was changed when the state Legislature created the intermediate state court of appeal. Presently, all criminal cases, including death cases, go to the court of appeal. A losing defendant retains a right of appeal to the state supreme court, which reviews the case under the plain error rule.⁵⁸

56. CAL. CONST. art. V, § 8.

57. ALA. CODE §§ 13A-5-30 to 13A-5-38 (repealed 1981).

58. ALA. CODE §§ 12-3-9, 13A-5-53 (1975). The Alabama system is in some ways

Limited information provided by the Alabama judicial staff suggests that adding the extra layer has not measurably protracted death penalty litigation, nor caused problems of delay or overload. The average length of time from trial court sentencing to final resolution in the state supreme court is two years.⁵⁹

A temporal comparison of delay and backlog under the old and new schemes in Alabama is not very useful due to the dramatic constitutional and statutory changes in death penalty law in the last three decades. Nevertheless, one would expect an increase in the length of death appeals since *Furman* and *Gregg* independent of the changes in appellate structure. Therefore, this lack of increase is promising in terms of the efficiency of the system.⁶⁰ Ironically, however, legislation now pending in Alabama would return the system to one of direct appeal to the supreme court. It is hard to fathom the reason for this (so far unsuccessful) proposal, except perhaps an erroneously perceived protraction due to the extra layer, or an inter-court turf battle. The legislation, in any event, is supported by the Governor and the state Attorney General (who complains the intermediate court is too slow), along with prosecutors' and victims' groups. This is an ironic echo of the anti-Bird movement in California, since it arises in the reverse jurisdictional pattern.

Ohio formerly gave condemned defendants merely a right to petition for review to both the intermediate and supreme courts, but now the state provides for a double mandatory appeal.⁶¹ One striking fact about the appellate structure in Ohio might make the entire system irrelevant to California: under the new death penalty statute, Ohio courts have affirmed all but one of the seventy death sentences appealed, and yet no one has come even close to execution in Ohio.⁶² Those in Ohio's criminal justice system perceive appeals as somewhat faster than under the old double-petition system, presumably because a great number of petitions for review were granted under the old system whereas courts now do not waste time examining petitions for review.⁶³

more similar to Proposal C than Proposal A since the intermediate court of appeal is a state-wide court.

59. Report by Mollie Jordan, Clerk of Ala. Ct. Crim. App., to Sen. Maddy, August 12, 1987.

60. S. 244, 1987-88 Reg. Session, 1987 Ala. Legis..

61. OHIO CONST. art. IV, § 2(B)(2)(a)(ii); OHIO REV. CODE § 2929.05 (Anderson 1987).

62. Report from Nick Walker, Dir. of Communications, Ohio Supreme Ct., to Sen. Maddy (July 23, 1987) (on file at the Santa Clara Law Review office).

63. *Id.*

There is no evidence of any complaints about delay or backlog in the state, although that fact is strikingly irrelevant to California in light of Ohio's all-affirmance, no-execution rate. The supreme court reviews cases on a plain error basis, but the affirmances have come with such alacrity that there have been few new issues to slow down the courts. The process is quite swift: Record correction takes only about six weeks, and the supreme court does all its processing in about a year.⁶⁴

C. *Proposal B*

The most obvious problem with this proposal — which essentially treats capital case like all other cases for purposes of appellate jurisdiction — is its unique constitutional problem. California would become the only death penalty state in the union that did not guarantee an appeal to the state's highest criminal court.⁶⁵ As explained above, the proposal would implicate the vaguer issue of the state's responsibility to ensure some mechanism for proportionality review.

Even subconstitutionally, this proposal might yield wildly disparate results among districts, and even among divisions and panels. It might literally, as well as figuratively, produce a death-by-lottery system, since results would be heavily dependent on the random draw of panels within divisions. The problem of randomness goes far beyond inter-district nonuniformity due to differences in legal ideology. It is a problem of wildly disparate case processing as well. Even within districts, division rules and customs vary widely in terms of formality and thoroughness of consultation among judges.⁶⁶ In division one of the second district, for example, a great number of opinions essentially replicate memoranda by an assigned judge ratified by the panel without formal conference.⁶⁷ Many divisions reveal a disturbing pattern of unanimity, with virtually no dissents or concurrences.⁶⁸ Other evidence of disparate custom and competence in-

64. *Id.*

65. New York's law might appear to be an exception, but it is now essentially constitutionally void (for other reasons) under state court decisions.

66. See generally Kanner & Uelmen, *Random Assignment, Random Justice*, L.A. LAW., Feb. 1984, at 10 (stating, for example, that within the Second District Court of Appeal, only division six holds formal conferences after oral argument, while divisions two and seven meet over luncheons and other divisions meet informally only when there is disagreement on a case).

67. Thompson, *Mitigating The Damage—One Judge, and No Judge Appellate Decisions*, 50 CAL. ST. BAR J. 476, 478-80 (1975).

68. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, AM. B. FOUND. RES. J. 543, 583 n.146 (1982).

cludes wide variations in terms of both publication and depublication rates (a three-to-one difference),⁶⁹ and large differences in processing time (a two-to-one ratio).⁷⁰

But most important, there appear to be different ideologies among districts and divisions. District rates for reversal of criminal convictions range from 3.6 to 9 percent, and even more strikingly, rates for divisions within a particular district range from 2.7 to 26.9 percent.⁷¹ The result of proposal B, then, would not only be disparate intra-court results, but also uncertainty on key instructional and motion issues for superior court judges within particular districts. The proposal might therefore ultimately increase the work of the supreme court, which would have to intervene in almost all cases to ensure horizontal equity and to resolve intra-district conflicts.⁷² Of course, these concerns implicate the work of the courts of appeal generally. The problem is simply exacerbated when death is the issue.

In any event, this proposal would still require us to determine the nature of "discretionary" supreme court review in death cases. The supreme court would presumably retain its normal power to grant hearings, but what will be the scope of review? As larger constitutional and statutory issues get resolved, most death penalty appeals will appear to be based on relatively fact-specific grounds. But appellants will obviously burden the supreme court with protracted arguments that their claims go beyond "mere error," and the supreme court may have to perform fairly thorough review of the record merely to decide the petition.⁷³

Further, even if a significant decrease occurs in supreme court's backlog, we must recall that backlog and delay are not the same

69. Division Two of the Second District has, ironically, the highest rate for both in criminal cases. Kanner & Uelmen, *supra* note 66, at 14.

70. Kanner & Uelmen, *supra* note 66, at 17.

71. Kanner & Uelmen, *supra* note 66, at 15.

72. See Kanner & Uelmen, *supra* note 66, at 16. For dramatic examples of intra-District conflicts on important criminal law issues, compare *People v. Niles*, 227 Cal. App. 2d 749, 755, 39 Cal. Rptr. 11, 14-15 (1964) (holding that defendant's assault of a police officer while attempting escape after petty theft bore no essential connection with the theft, and therefore, defendant could be prosecuted for both crimes under California Penal Code section 654), with *People v. Hooker*, 254 Cal. App. 2d 878, 880-81, 62 Cal. Rptr. 675, 678-79 (1967) (holding that defendant's assault on a theft victim was incidental to defendant's objective to burglarize, and thus defendant could be prosecuted only for petty theft under California Penal Code section 654); compare also *People v. Fleig*, 253 Cal. App. 2d 634, 642, 61 Cal. Rptr. 397, 403 (1967), with *People v. McGahuey*, 121 Cal. App. 3d 524, 528-30, 175 Cal. Rptr. 479, 480-81 (1981) (similar disagreement among decisions of court of appeal District that sits without divisions).

73. See CAL. R. CT. 29(a).

thing. Courts of appeal may also prove extremely slow in processing death cases. Of course, each court of appeal will have relatively few death cases, but each will also have a larger docket of garden-variety mandatory appeal cases, requiring judgment on the merits, to distract it from death cases. Moreover, if we make supreme court appeal non-mandatory, we introduce a whole new complicated issue to litigate: What if the defendant does not file a timely petition for review in the supreme court? What will be the standards of waiver, and of competence to waive?⁷⁴ There is no such thing, at least in death cases, as merely going from mandatory to discretionary review while capturing all the apparent savings of a reduced caseload.

Finally, this proposal raises serious "law of the case" problems that do not arise where a state's highest court has discretionary, certiorari-style review over intermediate appellate court judgments. If a court of appeal affirms a conviction but reverses the death sentence, and the defendant either does not seek review of the affirmance of the conviction (fearing jeopardizing reinstatement of the death sentence on retrial), or if he seeks review but his petition is denied, the law of the case doctrine might preclude supreme court review of the conviction if he is later sentenced to death and the court of appeal affirms.⁷⁵

D. *Proposal C*

Proposal C suggests a special court of appeal for death cases and might be seen as a variant of both A and B, since, as noted, the Legislature might provide for either mandatory or discretionary appeals from the death court to the supreme court. The key feature of this proposal is that it would negate any advantages and disadvantages of distributing appellate review of death cases among disparate districts and divisions of the court of appeal. Since this would be a statewide court, it might provide uniform, procedurally consistent review. Of course, whether it did so in fact would depend on the details of assignment and appointment procedures. Clearly, there would be no divergent regional results, but if members of the court serve on rotating assignments from the court of appeal,⁷⁶ the prob-

74. For decisions refusing to strictly apply the concept of waiver to death penalty appeals, see *Commonwealth v. McKenna*, 476 Pa. 428, 383 A.2d 174 (1978) (quoted with approval in *Massie v. Sumner*, 642 F.2d 72, 74 (9th Cir. 1980)).

75. Cf. *Price v. Civil Service Commission*, 26 Cal. 3d 257, 267 n.5, 604 P.2d 1365, 1370 n.5, 161 Cal. Rptr. 475, 481 n.5 (1980); *Davies v. Krasna*, 14 Cal. 3d 502, 507 n.4, 535 P.2d 1161, 1164 n.4 121 Cal. Rptr. 705, 708 n.4 (1975).

76. See S.B. 174, Reg. Sess., 1987-88; S. CONST. AMEND. NO. 3.

lem of death by lottery might still exist. At the same time, the death court proposal negates at least one advantage of Proposals A and B: the potentially enhanced supervision of record correction provided by local appellate courts over local trial courts. But more serious problems with this proposal abound.

Proposal C might create severe logistical problems by creating vacancies on regular courts of appeal (that is, if the Legislature is playing a zero-sum game with appellate judges). On the other hand, if membership largely depends on gubernatorial appointment, the politics of appointment might prove too volatile. The 1986 election demonstrated that death penalty politics distorts the selection of even those judges who decide a wide variety of criminal and civil cases. The volatility will only be exacerbated if the sole purpose of a judge is to determine which murderers live or die. Life will remain political for these judges even after they begin their terms, as they might become or be perceived as part of a "captured" agency with respect to either the prosecution or defense bar, because they will constantly face the same state lawyers, case after case.

Moreover, whatever benefits come from having a "specialist" court might be illusory. The benefits, theoretically, would derive from intellectual economies of scale in terms of special knowledge of the intricacies of death penalty law. But despite the frequent argument that few trial or appellate lawyers are equipped to handle the special doctrinal and procedural demands of capital cases, death penalty law is not a truly specialized corner of the law like, for example, tax or bankruptcy. It is a fairly accessible compound of substantive criminal law, criminal procedure, evidence law, and some general constitutional law. Conversely, creation of a specialist court could result in a false or harmful specialization. The judges who work on this court might suffer intellectual burnout and might become injured, by repetition and overload, to subtle differences in the cases. Judges who decide nothing but death cases might suffer a subtle narrowing of interests. In a very general way, they may lose contact with the philosophical enrichment offered by a widely varied caseload. In a more specifically harmful way, they may lose contact with specific bodies of criminal and evidence law which will, as a quantitative matter, largely be the work of the non-specialized courts of appeal. And this last problem may raise specific jurisdictional or precedential problems involving conflicting results on overlapping evidentiary or constitutional issues decided in non-criminal cases, or

even fundamental criminal issues decided in non-capital cases.⁷⁷

Moreover, to the extent that membership on the death court is not involuntary servitude, it may be very difficult to attract very talented judges to join. The best analogy we have is the quasi-specialized courts of criminal appeal in various states. The literature on these courts or on proposals for new ones should give us caution. Appellate judges overwhelmingly see civil dockets as offering far greater intellectual challenge and social prestige than criminal dockets, which they view as the seamy underside of the legal system.⁷⁸ Indeed, it may be for that reason that some states have rejected or abandoned intermediate criminal appellate courts.⁷⁹

IV. CONCLUSION

My serious doubts about the legality or practical feasibility of Proposals B and C should be obvious, so it is worth ending with a brief recurrence to Proposal A. The Legislature might well be able to fashion a version of Proposal A that would achieve noncontroversial gains in judicial efficiency at no cost whatsoever to legitimate legal protections for capital defendants. But in an area so heavily invested with political intensity and prejudice, the Legislature might be wise to avoid any dramatic structural change until all else fails. The question, of course, is how to tell when things have failed, and that may be the most politically invested question of all. The best course right now might be to allow far more time to put behind us the Battle of 1986, so that we can more accurately disentangle the question of fundamental structural flaws in the system from political issues for which structural arguments can often serve as pretexts.

B. *Postscripts*

Robert W. Peterson

Permit me to abuse the moderator's chair for a few pages to suggest a different approach to controlling the impact of death penalty review on the California Supreme Court. One of the many benefits of a conference like this is the opportunity it provides for bounc-

77. See Marvell, *supra* note 17, at 96.

78. See Marvell, *supra* note 17, at 96. Davies, *supra* note 68, at 583-87; Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 JUST. SYS. J. 372 (1981).

79. Marvell, *supra* note 17, at 95-96.

ing around ideas in the hallways over coffee. This is one of those ideas which never found its way onto the conference floor. The proposal is this: (1) All death penalty charges must be prescreened by a central person or body with a view to keeping the number of death judgments within the ability of the system effectively to review them; and (2) in return for staying within the "quota," the state will reimburse counties for the cost of the penalty phase of death penalty trials.

A prescreening proposal (without the provision for reimbursement) was suggested by Michael Millman in the *Los Angeles Daily Journal* (October 19, 1987). He suggested that District Attorneys might adopt among themselves voluntary limits or guidelines to accomplish this purpose. The suggestion was dismissed by representatives of the Attorney General's Office as "tongue in cheek" and as "not one of [Mr. Millman's] better ideas." I think the advisability of statewide prescreening deserves more thoughtful consideration. Let me explain why.

This panel demonstrated that even in the highly controversial area of the death penalty, there is substantial agreement that policy, politics, and practicality require that death judgments be reviewed by the supreme court. Likewise, all agree that there is a limit to how many cases the court, which still has the same number of justices it had in 1879, can be expected to review each year. Justice Panelli suggested a number around thirty-five per year. That number may go up slightly as the court resolves some of the knotty questions concerning the death penalty, but given the lengthy records in these cases and the careful review they require, that increase is not likely to be significant.

Unless the supreme court is to be held hostage to the death penalty, there is the need for a uniform prescreening by a person or body in a position to weigh both the need for the death penalty in each particular case and the limits of the ability of our legal institutions to cope with the overall burden of death penalty review. At present, District Attorneys, who are elected on a county wide basis, are neither in a position to do this nor are they required to do it.

I think it is common ground that "death is different." That is why we guarantee supreme court review; that is why the cases present a unique burden to the legal system; and that is why there is a unique need for uniformity. While ultimate review by the supreme court guarantees some uniformity, supreme court review of every death case is a tremendous burden on the state's entire legal system. It is not the solution; it is part of the problem. Again, this points to

the usefulness of centralized prescreening. Indeed, if, over time, the prescreening process appeared balanced and fair, the supreme court's post-screening role may become a bit easier.

District Attorneys, predictably, will not like the loss of unfettered discretion to charge death. The death penalty, however, transcends county politics. While District Attorneys may mourn their loss of discretion, at the same time their boards of supervisors weep at the costs of these trials. Indeed, a handful of cases in one of the smaller counties could bankrupt the county. For example, in June of last year Sierra County (population 3,200) reported that the cost of murder trials threatened the fiscal survival of the entire county. Shifting the cost of the penalty stage of the trial to the state would remove some of this burden and may placate some District Attorneys.

The most enthusiastic supporters of the death penalty would have to agree that the system is not working if it is so clogged with death penalty appeals that many or most of those sentenced to death either die of old age or are executed decades after their crimes. With the current rise in death filings, and with new death penalty laws being promoted by politicians attempting to sail on this popular tide, one need not be as pessimistic as Cassandra to appreciate the possibility.

Death is also different because the general deterrence assumed to flow from imposition of the death penalty is uniquely statewide. Unlike other convictions, death penalties are reported statewide, and there is little doubt that executions, when they come, will be given even wider coverage. If, in addition, a statewide officer or body were to take a firmer hand in prescreening, it seems fair that the state finance at least the penalty stage of the trial. It is also consistent with the policy requiring the state to reimburse counties for cost of state mandated programs.

State financing without a firm grip on prescreening, however, would be an unmitigated disaster for the California Supreme Court. The court is strained to the limits by the number of death convictions secured under the fiscal restraints of county budgets. If the state were to write a blank check to county District Attorneys, it might stimulate such an enthusiastic pursuit of the death penalty that it would be the death of the supreme court as we know it.

Ideally, the Attorney General is the statewide officer uniquely positioned to strike the appropriate balance. The Attorney General, after all, must not only defend death penalties on appeal, but must represent the state before the supreme court in all matters. Given the

above comments from the Attorney General's office, however, the Attorney General may have objections to shouldering the burden of prescreening.

In addition, it seems inevitable that, for political reasons, the Attorney General would simply become a "yes" man for County District Attorneys. Attorney Generals are politically ambitious and are unlikely to veto a District Attorney's request to charge death. With the example of the recent supreme court confirmation campaign still fresh, it is easy to imagine the meal an opponent might make of a veto in a dramatically appealing case.

Although it may be naive to believe an Attorney General veto would work, there are other possible prescreening techniques. Informal prescreening by the Attorney General's office, accompanied by some "jawboning," may be sufficient. Perhaps District Attorneys could meet and adopt uniform guidelines (*a la* Mr. Millman's proposal) which would strike the appropriate balance. Another alternative might be a panel (with either "jawboning" or veto power) made up, for example, of representatives from the District Attorneys' office, the public, and the courts (present Appellate or retired supreme court justices, for example). There are, undoubtedly, numerous other approaches that might work. I am not sure which approach is the best, but any is better than what we have, or do not have, at the moment.

Prescreening is, I think, a truly modest proposal. Even insurance companies require second opinions before operations; there are good reasons to consider the same for the death penalty.

Robert W. Weisberg

I agree with Bob Peterson's assessment of his own proposal. It merits plenty of consideration. Its major value lies in making prosecutorial decisions more coherent and uniform, to parallel the generally praised principle of judicial uniformity in death penalty matters. As Bob himself suggests, the most plausible objections will be very mundane political ones, concerning the politics of the Attorney General's office, and of local District Attorney prerogative. I want to look at the idea from a different, somewhat more sociological angle.

Of the many things that bother me about the death penalty, one of the most prominent is the manner in which it has become, especially in California, a symbolic proxy for clusters of related social and political positions. Purported supporters of the death penalty often know little about its costs and think little about its benefits, but

find supporting the death penalty a useful medium for expressing their more general postures about crime, authority, and social unrest and control. (To be fair, I must say that the problem is symmetrical: Purported opponents of the death penalty may be just as ill-informed and unthoughtful about it, and often use their expression of opposition as a way of signalling a somewhat self-congratulatory posture about society and politics). Worse yet, politicians both fall prey to and exploit this tendency. For them, the death penalty is a freebie: Support for capital punishment guarantees them great political capital with voters while enabling them to avoid harder issues about "the crime problem," to which the death penalty is essentially irrelevant.

This "posture-and-avoid" tendency is all the easier because we have no public accountability about the costs of the death penalty. Of course, there is much invisible social engineering and cost-benefit analysis going on at the county level. But I see value in making it more visible. More visible public or political accountability about how we direct resources to penalty trials, and how we evaluate the statewide social utility of the death penalty, would make this "posture-and-avoid" tendency at least a little more difficult. Capital punishment is an expensive social choice, and California currently exercises that choice in ill-informed, self-deceptive, and even dishonest ways. I'm intrigued by the idea of coordinating the bookkeeping and opening the books.

Michael Millman

There is good reason to restrict the death judgments in California to the core of the most aggravated cases, a far smaller number than falls within the broad eligibility criteria of the Briggs Initiative. The suggestion I advanced at the conference was that prosecutors voluntarily develop criteria which would result in the restriction of capital filings to the most egregious cases, which in turn will reduce the number of death verdicts returned each year. The Attorney General's office, with a statewide overview of the system, might be well situated to assist in establishing informal guidelines to assist individual prosecutors in this exercise of their discretion. However, I did not envision a formal system of prescreening in which the Attorney General would impose "quotas" on local prosecutors, and for reasons touched upon in the postscript, I am skeptical about the viability of such a proposal. My model of voluntary exercise of discretion may not deliver completely, but a model of involuntary imposition of quotas will, I fear, not deliver at all.

C. *Transcript — Death Penalty Appeals in California*

1. *Defense of Paper — Professor Robert W. Weisberg*

On the subject of changing death penalty appeals, I have to counsel a good deal of skepticism about some of my proposals though I hope not without any terrible prejudice towards any of them. And at a very, very superficial level of generality or abstraction, I think we can all agree on a ruling principle and that is the age old principle of "if it ain't broke, don't fix it." This is superficial simply because it doesn't really tell us how to determine whether death penalty appeals in California are indeed broken. That is a complicated question, not only technically in terms of court structure, but also a very, very heavily politically invested question. That's the first level of skepticism I want to counsel about these proposals in general. And it's something as I mentioned in the paper that I'd just like to raise as background and then drop, because I don't think it would be a fruitful path for the entire discussion.

But that isn't to suggest that we are talking about matters of legal process; changing procedures, court structures, which obviously directly affect the most powerful aggressive action that a state can take towards its citizens: capital punishment. There is obviously in the background the notion that one thing is broken in California, that is to say, we do have a death penalty law and in what we might loosely call the modern era we have had no executions and that doesn't make much sense. On the other hand, that is obviously a politically invested and rather controversial proposition; I just want to emphasize that I think we all have to struggle to some extent to try to talk about these rather technical or abstract questions of judicial efficiency, delay, backlog or whatever, without allowing our substantive views on the death penalty to illicitly creep into the discussion. In that regard, though, I want to emphasize that there may be an underlying difficulty in any particular discussion of major or drastic change in appellate court jurisdiction in California, and I think this is true elsewhere. We're talking about an area of case law in which, clearly, the supreme court has a great moral and political responsibility - a rather sobering one. In addition I think we have to realize that it may be very difficult to relieve any court of some of the logistic burdens associated with that very serious responsibility without in some way undermining that responsibility.

Although this is discussed at length in the paper, I thought I

might just mention it as background, I think haunting any discussion of changing supreme court jurisdiction in any context may be the perennial question that was much bruted about in law reviews in the 60's and 70's at the federal level; altering the structure of United States Supreme Court appeals by the creation of the often invoked National Court of Appeals. The court, which has never been created, and I suspect never will, was intended to relieve the United States Supreme Court of its logistical burden of the vast certiorari jurisdiction - the screening procedure. That concept was very, very popular among various commentators in the law reviews, has never really gotten anywhere, perhaps because there simply were technical and logistical problems with it that couldn't be resolved. But perhaps also because of this haunting feeling that you couldn't relieve the United States Supreme Court of its difficulties without undermining its responsibilities in some ways.

We have had a number of proposals coming through the state Legislature and through scholarly commentary over the last year or so about changing death penalty appeals. Obviously the kind of political ambience surrounding the proposals has changed rather drastically since the November election, and I think we have to be careful to try to separate our sense of the political significance of that election from these proposals which obviously purport not to depend on the makeup of the court at any one time. I've somewhat crudely summarized the proposals into three categories which don't quite do justice to some of the subtle differences among the proposals, and certainly over-simplify much of their technical nuances. In a birth of creative nomenclature, I've called them proposals A, B, and C. Let me lay them out briefly.

Proposal A, which is the one I find the most feasible and least unattractive, is a proposal to insert the court of appeal in between the California Superior Court and the California Supreme Court in death penalty appeals, without apparently depriving defendants of anything they are entitled to right now. Essentially, the entire capital case, the conviction and the penalty phase as they leave the superior court, would be appealed to the court of appeal. If, and only if, the court of appeal affirms both the conviction and the death sentence, then the whole case would move on automatically, by right for the defendant, to the California Supreme Court, as we do things now. What would not necessarily go to the supreme court would be any case where the death sentence or the conviction were reversed by the court of appeal, though it would seem that the prosecution, the People, would retain the normal right if they lost either phase of the

case in the court of appeal to petition for a hearing in the supreme court just like any other losing party. It's not clear to me that there would be any reason not to allow that.

Proposal B is essentially the most dramatic one and is the one which would truly eliminate the ultimate right of appeal, and I'd underline *right* as automatic guaranteed right of appeal to the California Supreme Court. It would make death penalty cases like all other cases, though there might be some subtle differences. And that is to say, a defendant convicted of capital murder and sentenced to death would be able to appeal conviction and sentence to the court of appeal. I would assume that the structure for appointment of counsel would continue. If the death sentence and conviction were affirmed then the defendant would be like any other losing party in the court of appeal. The defendant would have the right to petition for a hearing before the California Supreme Court, obviously with no guarantee. There is not a terribly high statistical probability of winning the petition for a hearing.

Proposal C a proposal which has received a great deal of attention because of Mr. Witkin's description of it in various media, would in a sense be a variant of either Proposal A or Proposal B. What distinguishes Proposal C is that we would not be talking about inserting the regular courts of appeal in between. Rather, a special court, which might be drawn from sitting justices of the court of appeal, but would rather involve a select group of appellate judges who would sit on the special court of appeal, although it might have other names. A court solely created to handle death penalty cases coming from the superior court. Now I say it could be a variant of either Proposal A or B because we could then have a sort of Proposal A too. In other words it could be the special court of appeal rather than the regular courts of appeal which would handle the case in the first round, but we could still have an automatic right of appeal of any affirmance of the death sentence to the supreme court, or it could be the petition for hearing mechanism as in Proposal B.

Now, let me try to lay out some of the background and highlight the main things I wanted to emphasize from my paper. What's going on here, obviously aside from fundamental political concerns, is a sense that there is something broken and the notion of what's broken focuses very much on logistical problems in the supreme court. Vaguely associated with some, I think, not very well defined notions of delay and backlog. I want to just cast a skeptical eye on a few of the aspects of the delay and backlog matter.

Obviously, death penalty appeals now take an extremely long

time in California. They spend a long time in the California Supreme Court, although as I mentioned, they also spend a long time between the California Superior Courts and the California Supreme Court. And even more obviously, the supreme court has to spend a vast amount of its time and resources on these cases. Now, one question is how long will this continue, assuming we do absolutely nothing to change the structure. As with all these other rather instrumental questions, my answer is, "I haven't the foggiest idea, but let me suggest some possibilities."

One is that it is not an inherent or inevitable problem. We may be talking about some relatively short-term historical trends. I'm not talking about a change in the court personnel, I'm simply talking about the kind of life-cycle of a death penalty law and this is not unique to California. In fact, we can learn something from some other states in this regard. And that is, death penalty laws as instruments of social policy have bugs in them. They have to be debugged, and the process of debugging is very, very slow at the beginning.

Constitutional law, as it is handed down to us from the United States Supreme Court, is complicated and often opaque. And, the initial burst of legislation on death penalty issues is often very politically heated and sometimes not very well thought out. Therefore, as many have suggested, we may have been in the last eight years or so, in a shakedown period in terms of the Briggs initiative, a shakedown period which might have been shorter had we relied on the 1977 Deukmejian law rather than the somewhat more politically messy Briggs initiative. It may be that what we simply see as an inevitable period of heavy litigation and constitutional intervention by the courts is simply because there are many problems in the Briggs initiative even though some of them have been settled. Many have focused on just a couple of very dramatic and messy issues. *Carlos* matters, the intent to kill requirement, *Ramos* matters, the famous problematic construction. It could be that things will start moving along faster. Again, just according to the natural life-cycle of things.

Some other more technical questions. Let's figure out what we mean by delay. To some extent we're talking about delay in the California Supreme Court and that bears a rather complicated relationship to backlog. They are not the same thing. But to make things a little more complicated, to some extent, we're not talking about delay in the California Supreme Court, we're talking about delay between sentence and final resolution of the case. Much of that delay takes place outside the California Supreme Court. I think the public is concerned about delay in general. It's less concerned about where it

occurs. Much of that delay right now is within the California judicial system, but technically it occurs before we get to the California Supreme Court through the rather arduous and archaic process of record correction and certification. This is something which may be independently curable. It may be somewhat curable by efforts of the California Supreme Court, but it is still not really delay within the supreme court. It is the long - average two year procedure - which occurs before the case officially even gets to the supreme court.

We're also eventually going to be talking about delay which occurs after the case leaves the supreme court. And that is the major form of delay that we've seen in the states that have had lots of executions, most of them in the South, and that is post direct appeal of review. Now some of this will be state *habeas* procedure I suppose, but I'm most concerned about federal *habeas* procedure, which is something that the California Supreme Court cannot control. We don't know how much that will contribute to delay because we've hardly sent any cases into the federal courts. It is also possible that we could have an adverse affect where a bit more delay in the California Supreme Court may have the effect of speeding cases up. If and when lots of California cases get to the federal courts within the Ninth Circuit, the perception that California has been very, very slow and deliberate about reviewing death penalty cases might cause the federal courts to say, "we're not going to have to pore over these cases with the constitutional scrutiny that we have to in Georgia or Florida, because we know there's a heck of a lot of due process in California" and therefore that last phase, the federal phase, may actually be relatively short.

I mentioned I'm not at all clear sometimes about the connection between delay and backlog. They are associated with probably some positive correlation but I don't think it's a terribly clear correlation. The consequence is we should not assume that if we distributed the cases to the courts of appeal, which would have a smaller backlog because they're going to have fewer cases per judge or per panel, that there is going to be a proportion that is speeding up. There are other factors which often cause delay: Questions of bureaucratic norms, judicial attitudes, personal efficiencies or inefficiencies, and so on. I don't think we should assume a perfect correlation.

Last point in terms of general background that gets back to my point about federal *habeas* in some ways. Sometimes one gets the feeling that there really is a natural life-cycle, not just to the life of death penalty law, but to the life of a death penalty case in the political context of a particular state: if you shorten one thing you're go-

ing to expand another. I've made some inquiries into what's going on in a couple of the states that have adopted procedures similar to Proposal A, most obviously, Ohio. I'm getting more information about the state right now. It has seen an affirmance of the overwhelming majority of its death sentences, but no executions whatsoever, as California. And, indeed, actually far less pressure among the electorate to witness executions. What's going on in Ohio, as I understand, is that a lot of cases pass through the appellate structure very quickly on direct appeal and suddenly they realize that they do not have a structure in Ohio for insuring appointment of good counsel to take things to the next stage, especially the state *habeas* proceedings. The cases have not by and large arrived in federal court in Ohio. They are stuck in state court on post conviction review. They are not going anywhere, apparently Ohioans have accepted the situation right now as an optimal one - lots of sentences - no executions. Nobody is complaining, apparently. But the problem is that things were sped up but now they have slowed down. They don't have enough lawyers to handle the cases they have affirmed.

Let me just say one final word on background before I summarize a few things about the logistics of the proposals. I wanted to address briefly some of the general constitutional concerns and in a very, very small nutshell I am going to say that I am not sure that they are terribly serious. As I lay out some of the case law in my paper, arguments could be constructed out of United States Supreme Court cases that there may be something similar to a constitutional right to a guaranteed appeal in the state's highest court. I am speaking extremely wishy-washily about all this because I think it is a very wishy-washy inference that can be drawn if at all. The so-called eighth amendment due process, over the last twelve years, has always been rather amorphous, and I think it's gotten more amorphous or perhaps simply weaker over the last few years. And I'm not sure that there is a federal constitutional obstacle to any of these proposals.

Another little footnote, which is literally a footnote in my paper and I don't want to spend time on now, there have been some questions raised about the constitutionality of retroactive application of any proposals in terms of *ex post facto* problems. Again, just reading the conventional sources, I'm not sure that they would really be a categorical obstacle either. What I want to suggest, though, is something a little looser than straight constitutional law. There is a kind of public constitutional perception which is powerful in the public mind, that there is something morally necessary about the highest

court of the jurisdiction having ultimate responsibility for looking at every death penalty case. I can't articulate that in very firm constitutional doctrine. I don't think it really derives from constitutional doctrine. And I am not exactly sure what kind of final review that may mean. It may mean looking at every fact of every death penalty case. It may mean the macro view in terms of proportionality review, or "gross legal error" review. It may be something like clemency review performed by the court at the last minute before a death sentence is finally upheld. I think, though, it's a powerful symbolic force in California and elsewhere, and I don't think it should be demeaned by virtue of the fact that it may be more symbolic than legally doctrinal.

The Bork hearings have shown us that though it's not very doctrinally well laid out the symbolic notions of constitutional law are very, very powerful. I will assume that the public has not parsed all the doctrinal difficulties in *Griswold v. Connecticut*, and yet the public in some sense, monolithic sense, seems to have some general notion of its constitutional necessity. By analogy, the same may be true of the notion that every execution must go before the California Supreme Court. I don't know how powerful this perception is.

Let me say some things about the specific proposals. The attractive thing about Proposal A, as I said, is that it apparently deprives the defendants of nothing. If that were true, then we could simply ask whether it achieves any significant gains, economically logistically, in the state. In some senses, of course, it may increase litigation. It will in those cases gain affirmance in the court of appeal, because then the case is going to start all over again in the supreme court, although not obviously completely all over again. There will be some economies of scale in terms of record correction, sharper briefing, and so on. Also, there may well be a decrease in litigation. Certainly, in the California Supreme Court in those cases that are reversed.

We can talk perhaps about some of the interesting technical consequences of all this. The thing that I want to emphasize is that we should not immediately assume that there are no downsides at all to defendants. In other words this a costly matter in terms of a defendant's due process. First of all, to decide that we would have to identify exactly what the California Supreme Court would be doing when it received affirmed cases from the court of appeal. If it were just doing conventional review for clear legal error, or proportionality review or whatever, an argument could be made, although I'm not necessarily subscribing to it, that there has been a loss to defendants as compared to the current situation. They would not be getting

the full review that they are now getting from the California Supreme Court.

The other much more complicated question is that question of non-uniformity. Now this assumes that uniformity is going to be of special value in death cases. That's an assumption we can examine. It may seem that as long as there is a guarantee of affirming death sentences before the end of the single supreme court, there is no problem of non-uniformity. That's obviously not true because to the extent that some courts of appeal are more lenient than others on death penalty cases, a defendant whose case goes to the less lenient court of appeal, though he's guaranteed a shot at the supreme court, nevertheless loses a chance at getting his case stopped earlier as compared to someone who does come before a more lenient court of appeal. That raises some messy questions about the courts of appeal.

Under Proposal B, questions about non-uniformity become more crucial. Under Proposal B, if we take seriously the federal constitutional concerns about an eighth amendment due process right of review by the state's highest court, we must face them because Proposal B, by definition, removes that right. I just want to emphasize that it is under this proposal that we have to talk about what goes on in the courts of appeal. They would have the most pressure under this proposal. The question of whether they are properly geared up, whether we have enough procedural uniformity to insure at least due process uniformity, even though we could not fully examine any clear doctrinal way, the substantive uniformity. We also would start getting into some other rather complicated questions that many commentators have noted. We still value appeal to the supreme court, but do not guarantee it. We may get into rather messy questions of waiver, and so on.

Let me try to say a few words about Proposal C. Proposal C is a very interesting one. This is for the special court of appeal. In terms of the notion that we could achieve some technical or economic gains here, economies of scale, if you will, without any losses in terms of due process rigor. It is similar to analogous types of courts that have been proposed, and to some extent created in other parts of the country. I suppose it bears some resemblance to the National Court of Appeals, the Federal National Court of Appeals which I mentioned earlier. Although unlike that one, this will be highly specialized. It certainly bears a resemblance to a court we have in a few states like Texas and Oklahoma which are specialized intermediate courts, though not quite as specialized as this one. I'm talking, of course, about courts of criminal appeals which in some states are an

intermediate court between trial courts and the supreme court of a particular state. Some states actually replace them entirely. What can we learn from these things? I think we have to be a little careful about the notion of specialization. It seems to have some attractions. There's something about the word, perhaps, that makes the notion attractive. I think we have to be careful about it. I'm not quite sure how specialized death penalty law really is.

That specialization question arises in one particular context where one sees a great deal in litigation. There are obviously many ineffective assistance of counsel issues being litigated all over the United States in death penalty cases. It seems where a death penalty trial lawyer is criticized for ineffectiveness, it often has to do with the special demands of which he or she is supposedly ignorant in the penalty phase. The notion that, well this guy knew how to try the conviction phase, but didn't know that you were also supposed to go out and find mitigating evidence about the defendant's high school record, for instance, associates, and so on. This is also mentioned in terms outside the litigation context now, in terms of the general difficulty of finding appointed counsel in capital cases, especially on appeal, on the grounds that it's specialized. Most people don't know about it. I think any good lawyer can probably learn the law of capital punishment within a relatively finite period of time, even if he or she would shudder at the thought of doing antitrust economics or corporate tax doctrine. It's essentially a mixture of some evidence law, some criminal law, some criminal procedure enhanced by some special doctrines coming down from the various courts, and some statutory complications. So, I don't think we should exaggerate the need for specialization in that regard.

Now there may be some gains in terms of economies of scale, as opposed to distributing the cases throughout the courts of appeal all over the state. But I think before we adopt that notion we ought to think of the other side of specialization. We can learn something, I think, from some of the states that have had criminal courts of appeals. They've been highly criticized for a couple of reasons. First, although one might think this would be a terribly attractive job for people, as they are almost substituting for the supreme court in its ultimate authority, I'm not so sure it would attract terribly good judges. The sociology of appellate courts tells us that most lawyers and judges overwhelmingly see civil cases as affording more professional prestige, and more intellectual interest. Criminal law can be pretty dirty business, and it's your guess as well as mine as to whether death cases are more dirty than other criminal cases or less

dirty because they're somehow more exotic. I don't know.

Related to that is the notion that even if by some mechanism we could get the best possible judges to sit on the court of appeal, the other question is whether there are further bad consequences of specialization. Death penalty law is not all that specialized, I said in the sense of the amount of education it requires. It's also not all that specialized in the sense of it being detached from some other fields of law. In fact, it is enriched, or at least influenced, by other fields of law, such as criminal law and criminal procedure, other aspects of evidence law and other aspects of constitutional law which do not by themselves have anything to do with criminal law. There may be some real costs in having a court that is examining death penalty cases all the time where the judges of that court do not spend a good deal of their time dipping into the vast array of law that our current justices now examine.

I think I've been most critical of Proposals B and C. I have my doubts about Proposal A. I think in the discussion that may be the proposal most worth examining because as I said I'm attracted to the notion that it may have some sort of net plus possibilities, not much downside for defendants and fair number of upsides for the court system generally. I guess I'll end by saying that especially considering the rather heavily fraught political context of death penalty appeals in California over the last year, I'm not quite sure if things are bad enough to fix yet.

2. *The Panelists' Discussion**

a. *Justice Edward Panelli***

I might start by saying that when I first came on the court, I was very much in favor of any proposal that would have gotten death penalty cases out of the California Supreme Court into any other court, whether it be a special court or the courts of appeal. Now, just about two years later, I have some severe reservations about the alternatives suggested. We all operate under the assumption that the capital cases are different because death is different. So then, you have to determine whether the savings, if there are any, by having them first go to the courts of appeal, will be a real savings. I have some serious reservations whether that would occur.

First of all, one thing that we have going for us, is that seven of

* We are indebted to Professor Robert W. Peterson for moderating this discussion.

** Associate Justice of the California Supreme Court (1985-present).

us review cases involving the death penalty using a uniform standard. We approach the issue itself, or whether it be the standard of prejudice, the same way in all cases. I am concerned that this uniformity would be lost if death penalty cases are spread among eighty-eight justices of the court of appeal. As pointed out in the paper, there is rather significant disparity between the divisions of the courts of appeal with respect to affirmances and reversals of criminal appeals. The concern would be that same disparity would exist when spread among the death penalty cases in the court of appeal. As I say, one of the strongest things, I think, going for the present system is this uniformity by which the issues are addressed, and by which the facts are placed against the legal points themselves.

The other thing that bothers me about the diversion of the death penalty cases to courts of appeal, is some sort of proportionality. Having seen the number of cases, you start to get some feeling of whether this is an abnormal case, whether it's an aberrant verdict, or whether it fits in with what you have seen in other death penalty cases. Having sat on the court of appeal for two years, you don't get that same sense, it seems to me, of proportionality, because you're not addressing all the cases, or not seeing all the cases, addressing the same issues. So I have some real concern as to whether or not defendants and the prosecution, would in effect, be getting the benefit of the horizontal proportionality that we have at the present time.

Another problem that I have with respect to the diversion is that of accountability. The seven of us who are charged with this awesome responsibility at the present time, are obviously accountable for what we do, and I have some concern that if we were to review the cases coming from the courts of appeal as we do presently on petitions for review, that some of that accountability would be lost. As you can imagine, when the cases come to us on direct appeal, we start from square one, first day of jury selection, to the end of the verdict, whereas on petitions for review necessarily we're reviewing what the lower court has done. We focus in, generally, on the areas of concern to the intermediate court for we do not have the time individually to get into the record to see whether some of the other problems really are serious enough for us to be involved with.

The other thing that I have found with respect to death penalty cases, is that a lot of it isn't just a question of legal issues, it's the application of the facts. On the intent to kill issue, for example, we could have many different views as to whether the facts do or do not justify particular special circumstances in specific findings. A lot of that is a factual determination, factual evaluation that has to be

made by each of the individual justices. I feel much more confident having the same seven people making that evaluation than I would if eighty-eight people made that same evaluation. I would not know whether they used the same standards in all cases.

Of course, all of this discussion about diversion or intermediate appeal stems from a belief that it is politically possible. I probably should have started my commentary by saying, politically, I just don't feel that in this day and age the electorate of the State of California would be willing to amend the constitution to have part of the death penalty appeals go to courts other than the supreme court. I have serious reservations based on what occurred last November that the populace of California would say "yes, we're going to diffuse the responsibility for death penalty appeals to the justices of the courts of appeal that are elected by district rather than state." Granted, Proposal A would suggest that when the death penalty case is affirmed it would come to us automatically without the request of the appellant. The concern that I have is, assuming a case gets reversed, the court of appeal finds that there are guilt phase errors that require retrial. At that point, the prosecution, the People, do they petition our court for the review of the guilt phase errors? Otherwise they're bound by law of the case if it goes back down. So it seems to me that the process is going to be bifurcated, that the length of the delay is going to be extended, and that the results really won't change a great deal.

Which brings me to what I wanted to say about the backlog. As pointed out, most of the backlog, most of the delay occurs in the preparation of the record, anywhere from two to three years which is all outside the workings of the California Supreme Court. Whether those problems can be better addressed by courts of appeal who have closer contact to the superior courts, I question, based on my experience on the court of appeal. The problems of record correction have to do with the trial deputies in the prosecutor's office being tied up with other cases. The judges being involved with other cases that have to sit in and make record review decisions, when it really doesn't move their case load along. They have their present cases that they're concerned with. This case is beyond them, verdict has been rendered and it's up to the appellate courts to take care of the process. So we find many attorneys requesting time extensions for briefs because they haven't been able to get the cooperation of the lower courts and the trial attorneys. Whether this would be obviated if you had closer connection with courts of appeal, I have some serious reservations.

Once the cases have gotten to the court, I really think that things now, as Professor Weisberg pointed out, are starting to move along. The Briggs initiative issues have more or less shaken out. Once we get a few of these cases out of our pipeline, which we will be doing shortly, I think we will give some direction to trial courts so that the problems that we've had in deciding capital cases will no longer be with us, or not to the degree that they've been with us.

Cases were coming in at the rate of about twenty-seven to thirty a year. At the present level we could probably do five cases per year per justice, which would be thirty-five, which would take care of the current load and address the backlog by about seven or eight cases a year. Whether affirmances of the death penalty as suggested in the paper means the prosecutors would be bolder in seeking the death penalty so that we would have an increase in the number of cases, I'm not sure. But those are my reservations with respect to Proposal A.

I think the problems with Proposal B are the same, but probably heightened because both the appellant and the prosecution would be petitioning for review. My concern is that neither would get the review that's required when you're dealing with a death case. Proposal B, with respect to having a special panel of the court of appeal, based on my two year experience, I think it would be hard to recruit someone who's going to sit on nothing but death penalty cases. Our staff attorneys get tired of the fact that they have to do one or two a year because it is quite an emotional experience, and it takes a lot of effort. Whether judges who would be sitting on death penalty cases all the time would then get kind of conditioned to some of the serious crimes that we obviously see in death penalty cases, with the result that their sensitivities are dulled so that issues which may appear important when we see them just eight times a month instead of twenty-seven times a month, pose some problems for me.

So I really am concerned that any attempt to divert the cases from the supreme court to the courts of appeal would be ineffective in that they would cause greater delay. I'm concerned that rights of defendants could be affected based on the luck of the draw where they happen to fall, within the courts of appeal and the composition of the panels. That as a result the uniformity of decision and, the horizontal proportionality that we presently maintain because of the same seven people making decisions in all cases would be lost. Lastly, is the fact that the same standards of review would be applied by the seven. Those issues, I think have to be addressed with respect to defendants. The other thing is that, if in Proposal A the

prosecution has review, and they have no automatic review of reversals, that we're going to see the prosecution necessarily petitioning at intermediate stages of the process just to protect themselves from law of the case situations, which means we're going to look at the case twice. At first, I thought that having the court of appeal read the record and filter some of the errors would be an assistance, but I now have some serious reservations about that. Thank you.

b. *Herbert F. Wilkinson**

I pretty much agree with Professor Weisberg's paper all the way down the line as to his essential conclusions and particularly as to the value of the insights that he offers along the way. Most importantly, I agree with what I take to be his bottom line conclusion, namely that now is not the time for any of these proposals to be implemented. I think that's true and I'd like to emphasize the reasons from his paper why that's clear.

Number one, this whole issue is at present, an aftershock to the political reality which occurred last November. I have a real hesitation about deciding this issue now, hot on the heels of that election, because I'm afraid that the adrenaline that we pumped out of that is still at work among us. The other problem I have is that after you are a classic counter puncher for a number of years, you probably tend to be more conservative about that sort of thing. But I simply have the perception that we don't know all there is to know and I don't think we know enough to make a reasonable decision about any of these proposals.

One thing that Professor Weisberg doesn't touch upon that I think is a consideration is that when the new members of the supreme court came aboard, all of a sudden, due to the California Constitution, the backlog became artificially expanded. Many cases, which had been argued before the old court, all of a sudden by virtue of a constitutional provision, had to be re-argued before they could be decided. So that on one day you may have had a backlog of say fifteen or twenty cases, and the very next day, its up forty or fifty more. I think it would be unwise to implement any of these proposals until we see whether that artificiality drops quickly away or whether we get rid of that. In other words, I don't think we're dealing right at the moment with the backlog that's likely to occur over a longer period of time. I am in complete and hearty agreement with

Professor Weisberg's comments about the delays in the record certification process.

I know that in the informal communications which passed between my boss, Steve White and Mike Millman, the dear Steve, dear Mike letters, that there are from our side at least, a number of gentle proddings about can't you do something about defense counsel who insist on raising, from our point of view, ridiculous record correction, etc., etc.. And any attorney on either side who's handled these cases could tell you stories that would make you laugh or make you cry, depending on your disposition about the sorts of things in the record that have to be corrected and augmented, and so forth. The immediate question arises, whose fault is it? My perception is that the record certification problem is getting better and I think that's to do with the efforts of the Chief Justice. I keep a collection of my favorite orders from the California Supreme Court and these chiefly have to do with the court's orders in record certification matters. They are getting, to my perception, more testy as the months go along. I like to think that there is a pressure being exerted that I'm not fully cognizant of, obviously, to superior courts, to county clerks, and to all of those people, to get those things moving along. I think in the long run that the real power to do something positive about that problem rests with Mike Millman and the California Appellate Project (CAP) and I'm persuaded, willing to believe that, in fact, things will get better due to the activities of CAP and due to the activities of the supreme court.

The problem as I see it now, is that despite penal code provisions and rules of court, as Justice Panelli says, at the superior court level, on the part of all the parties, it's a matter of out of sight, out of mind. Those cases are behind them, they're gone and they're on to other things. Now to get people back together to clean up something that the all too easy tendency, it seems to me, is just to say, well let's give them whatever they want and get along with it. And that takes time. And it takes a lot of time as Professor Weisberg said.

I think also, another problem about not knowing what the problem actually is, is we don't have the data for the future. I think that the backlog and delay problems are going to be increased once these cases, assuming a number of them are affirmed, begin collateral review. The supreme court is going to have a caseload of collateral review cases to handle, and I don't think we know the magnitude of those yet. Related to this is a problem of more time to do important civil appeals. On that side of the question, there is to my way of thinking, a similar lack of knowledge. I'm also concerned

about the important criminal law questions that aren't being decided by the court.

It strikes me that if you want to make a case for doing something about the backlog and the caseload problem, one of the things you're worried about from the perspective of the criminal practitioner is, if you look at the oral argument calendars for the last several months from the court, you'll see there every month, six to nine death penalty appeals, whether they're re-arguments or continuing arguments. You will see, I believe, about one or two ordinary criminal cases and non-death penalty appeals per month. That, frankly, worries me because I have the perception that: (A) A lot of important criminal questions are not being decided; or (B) If they are being decided, they're being decided in the context of death penalty cases. In other words, death penalty cases are not just death penalty laws. When you talk about the guilt phase of the trial, you're talking about ordinary criminal issues that happen to arise haphazardly in cases which the supreme court has to take, and not in cases in which the litigants have actively tried to make that issue focused and accessible. I have two fears concerning these issues: (1) that the important issues wouldn't be decided or are not being decided; and (2) that if they are being decided, they're not being decided in the cases which present them in the clearest light.

I think Professor Weisberg is also entirely right, that as we get into this process, a lot of the delay and the statistics from those states which have had the experience can indicate this, that a lot of the delay is going to be ascribable to federal courts, specifically the United States District Courts in the Ninth Circuit. Nobody knows at this point, how long or even how the Ninth Circuit is going to treat these cases. There isn't a history of Ninth Circuit participation.

Finally, I think it ill behooves us to attempt to change matters in so drastic a way, when there are of course, other possibilities. The possibility is that you could ease the supreme court's case load by changing other aspects of its jurisdiction, such as the bar discipline cases, the Public Utilities Commission cases and what have you, and to me until you consider those alternatives, it strikes me that these proposals are not wise.

So, as to conclusions, I agree with Professor Weisberg right down the line. I also find Professor Weisberg's paper to be a uniquely human paper of the sort that I'm not used to reading, frankly, in the context in which I work. I gave the paper to a colleague of mine who's views I very much respect, and he said, you know what this is like, it's like being in the audience and watching a

very gifted magician do sleight of hand and yet he's so good, and he's so interested in it and interested in you that occasionally he stops to show you how its done. And that's sort of how I feel about Professor Weisberg's paper. I think that I should explain how I feel about that, by the sleight of hand and all that. I mean that the insights that he offers and explains, I think are very deep and very complex insights, and they're tossed off in a couple of pages. Particularly, I have in mind that part of the paper where he talks about jurisprudential concerns, and there is a line in his paper on which he talks about the possibility that there is an optimal number of executions that we need just to keep the art form alive. I mean I can see myself, you know you can see yourself in the shoes of the author sitting there thinking "aw, can I really say that? Naw, or ya, I like that idea so much that I will go ahead and say it." And to me there's a lot of that in the paper. I think he's right about that. I think, we may not consider the problem in quite that way, but I think that ultimately, if history's any guide, that there will come a public consensus about how many executions are enough and I have the sense for our purposes that where that debate will center is on the future of the felony murder rule. But I think that's significantly down the line.

Finally, and I think this is the greatest insight of the entire paper, it would be I suppose easy for me to come here strictly as an institutional representative, official representative of the Attorney General's Office and say; "Look, we're against all these proposals because our perception as litigants is we're going to win more now than we're going to lose. So we're satisfied with the status quo." And I could tell you that there are any number of people in our office who feel exactly that way whom I like to think do not take the particularly larger view. It seems to me that these, and I can't articulate it even as well as Professor Weisberg, or Justice Panelli, but it seems to me that these death penalty cases, in terms both of what you're asking to do, to deprive one of the citizens of his life, and in terms of the social interest and the social wrong that has been done, they are so important, morally, and legally, to both parties not just the defense but to the prosecution also that I would feel bad about having them any place else except the supreme court. I think one of the things that Justice Panelli said which is absolutely true is what Professor Weisberg calls undermining the moral responsibility by taking away the responsibility, I think the first place that I would look and worry about that happening is at the point where the cases go first to the court of appeal and then say the death penalty is reversed, the

People then are allowed to petition as an ordinary petition for review. I don't think those cases would be handled quite the same way, and I would hate for that to happen. I would think that at that point, that would be the first place I'd look to see if by transferring the responsibility you have not also undermined the responsibility. I think it's a marvelous paper and I commend it to all of you because it's obviously a serious problem and one that I would hope all of the litigants would take as big a view as Professor Weisberg has. Thank you.

c. *Michael Millman**

There is a point in Bob Weisberg's paper that says, is there an appropriate number of executions in California. It seems to me that one of the problems with these discussions which have been going on for several years and I participated in it in the Legislature and various other forums, is that we all seem constrained to deal with the back end of the problem, that is, we treat as given, that there are so many death judgments which appear every month or every year at the doorstep of the supreme court and then we all scurry around to handle those cases.

Let me tell you what those numbers are. Starting in 1979, the numbers were respectively per year, twenty to twenty-four, forty when I think Briggs started to kick in, thirty-nine, thirty-seven, twenty-nine, eighteen in 1985 which was the low figure, twenty-six last year, and twenty-five so far this year. And most distressingly, eighteen in the last four months. I don't know what to make of that eighteen in the last four months. It may be a statistical fluke, or it may be a reflection of a cycle. It may indeed be the result of prosecutors feeling that it is now more in their interest to go for it given the changes in the court. I don't know. But I have to be concerned about it in part because one of my responsibilities is to find lawyers to take appointments in those cases and it's going to be hard to cover eighteen cases in a four month period.

Now, is that number a given? Is there a correct number of death judgments? After all, we look at the constitutional theory. Special circumstances are supposed to narrow the universe of first degree murders to a smaller sub-universe of cases which are death eligible. That's their constitutional function. The question is how much narrowing are we getting under the current statute? The Briggs initia-

* Executive Director, California Appellate Project.

tive was enacted specifically to expand the number of special circumstances to cut down the narrowing function. And every year in the Legislature there are more proposals to expand the number of special circumstances.

We have something like 3,000 willful homicides a year in California. Of those, approximately forty percent of the adults arrested for murder end up with a murder disposition. And my impression now is that under the Briggs initiative, the special circumstances are so broad, that pretty much any first degree murder with a little imagination on the part of the prosecution can be charged as capital if the prosecutor seeks to do so. And we see enormous diversities in prosecutorial exercise of discretion in different jurisdictions. At present, the number of the capital cases charged each year is on the order of 300 to 400 cases. And since we know that for the last ten years, the percentage of death judgments to capital chargings has very consistently been ten percent as a figure you can just bet on year after year. That leads to the figure that Justice Panelli referred to and that I've indicated to you, it's sort of on the ball park of thirty to forty death judgments a year coming out of those 300 or 400 charges. Well, if you increase the number of chargings to 1,000 you could significantly increase that number of death judgments. Alternatively, if you decrease the number of chargings to 200, you would significantly reduce the number of death judgments a year. I don't think that's so implausible if you look at S.B. 155, which is a 1977 law authored by then Senator Deukmejian, which was not considered to be a soft law. It had a much narrower base of special circumstances and I think that if the prosecutions were being guided by those criteria, we'd see far fewer death judgments.

One of the questions you have to ask yourself about the Briggs initiative, is whether or not it is constitutionally required that a defendant have the intent to kill in order to be subject to the death penalty. It doesn't make a lot of sense for society to want to execute somebody who unintentionally killed in the course of a felony, even if society can. Is that the appropriate line drawing for these questions? Now, if you look at the percentages you realize that basically what this society is going to do is sentence one percent of the willful homicides to death, i.e. the people who commit willful homicides. That percentage can be perhaps as low as .05%, perhaps as high as 2%. If the number is .05% instead of 1%, so that we have fifteen death judgments a year, which is consonant with the pattern in the 40's and 50's. The supreme court basically received one death judgment a month. And I have no doubt the court can comfortably re-

view fifteen death judgments a year. That's a workable number in terms of the court, in terms of finding lawyers to handle these cases, in terms of the whole series of institutional considerations. I think, on the other hand, if you make the number 2% and you end up with sixty death judgments a year, which if you extrapolate from the last four months, you could project to, you end up with a number that the system can't handle well at all. And I ask whether it's worth the cost. Whether it is in prosecutor's interests, society's interests to charge 400 or 600 or 800 capital cases when you could charge more selectively 200 capital cases. The figures that I'm talking about are consistent with our experience in California.

Politically, people talk about returning to the good old days when we had capital punishment in force, when we had executions. I'm not sure what figure that conjures up in people's minds. How many people we think were executed in the good old days. You may be surprised to know that. California executed 466 people in this century. If you take that number, and average it out over eighty-seven years, the number is 5.4 executions per year. If you want to be a little more conservative in your calculation and leave out the last twenty-seven years when there was a marked decline in executions, and just do the average over sixty years, the number is 7.4 executions per year. The highest number of executions in one year was seventeen in both 1935 and 1936. And in only six years in this century, have more than ten people been executed in one year. It seems to me that if one gets past the political rhetoric of executing every person who commits murder, which I hear from time to time and which is absurd in terms of the realities of the system, then you have to recognize that executions are, in fact, largely a symbolic act in California. Only a small, a very small percentage of the people who commit murders are going to be executed. And if we are now looking at this from a systemic standpoint, then I ask the question whether it is marginally worth it to the system, for that small symbolic number to be thirty or forty rather than ten or twenty when the reality is that the consequences of having thirty, forty, fifty, sixty death judgments a year are so drastic to the rest of the system.

I want to say one other word about heightened scrutiny and the way we define the problem. Most of the discussions on the shift of the cases from the supreme court to the court of appeal approach the problem as an administrative one and I certainly acknowledge that there is a large administrative component about how the court will handle these cases. But the way we define the problem in some way often suggests the answer, and if we define it only as an administra-

tive problem, I think we lose a lot from the equation. Death cases, everybody acknowledges, in principal require heightened scrutiny. And the question from my standpoint is, what degree of scrutiny is any system going to produce? When we transfer cases to the court of appeal, it seems to me that there is first of all an atmospheric effect at work. As Bob Weisberg said, then these cases get treated like any other case, and the defendant becomes like any other appellant. And I think that the defendant is not like any other appellant. It is important that those distinctions be preserved.

Beyond the atmospheric considerations, there are the actual functional questions. I think that people are right to point out that we don't know how things will work when you change a system drastically. We all ought to be cautious about doing that. But let me just ask some trivial questions about transfers to the court of appeal. Where will the court of appeal get the lawyers to handle these cases? Will they be sufficiently qualified? How much will they be paid? Will they have any assistance? Do you get oral argument in a capital case? These may seem like a silly question, but it's guaranteed in the supreme court - it's not guaranteed in the court of appeal. Do you get to argue for forty-five minutes as you do in the supreme court because there are so many issues in capital cases? What do you get on the court of appeal? Will the court of appeal decide these cases in unpublished opinions? There is nothing now that says they can't.

I am concerned, in general, when you load up a system, when you ask it to decide a lot of cases very quickly, what that does to the quality of the decision making process. Not only because as you shorten the time span, you increase the unreliability of decisions in a neutral way. But I think eventually as you shorten the time for review of a case, you increase the likelihood of affirmances because if you think about it, all the presumptions on appeal are in favor of the judgment of the court below. So the less time that somebody had to scrutinize the lower court decision to determine whether there was error there, and whether the error was consequential, the more likely it is that there will be an affirmation of the decision below.

I want to finish by saying that I must admit that the concerns that I have about transferring cases to the court of appeal to some degree apply to my concerns about the decisions of the supreme court. And I had some trepidation about voicing those concerns, until I read Professor Thompson's paper, which is in your packet, and the matters that he touched upon. The allocation of the court's time between processing the agenda, as opposed to actual collegial review of

the decisions and the problems of delegating decision making to staff, are exactly the nature of the concerns that I have when the supreme court is being asked to review as many cases as it is being asked to review. I know, for example, that three justices, new justices of the court were confirmed on March 18 of this year, and in the first week of April they heard, in addition to the rest of their oral argument calendar, ten death penalty appeals. Now if you think about how big those cases are, how long the records are, how long the briefs are, then I have to ask myself how much did those justices know about those cases when they sat and heard oral argument. I don't know the answer to the questions about how many justices read the records in these cases. How many justices even read the briefs in these cases?

To what degree is the court constrained to rely on calendar memos prepared by staff - some very junior staff. That bothers me. I believe strongly in the collegial process. I don't come to clear thoughts very easily. I believe in strenuous debate. I believe that justices should be involved in that debate, and I'm concerned if the press of business, the press of review of cases impinges on the amount of time that they have to decide those issues carefully.

I think the observation about the non-capital issues is particularly pertinent. If you think about reversals and affirmances, reversals don't require the treatment of very many issues. If you reverse on a guilt phase issue, if you want to, you can just decide that issue, and not touch on anything else. If you reverse on penalty, you can decide one penalty phase issue, and leave all the others aside unless you choose to address them for the benefit of the trial court on a retrial. But when you affirm a case, you have to treat every issue. And in a capital case that may mean twenty, thirty, forty or fifty issues, many of them non-capital. And I wonder to what degree the court can give the careful consideration of those, both capital and non capital issues, when it has to decide so many of those issues in so many cases, instead of as Mr. Wilkinson indicated, picking carefully the individual case that is most optimum for review.

So, my concerns go across the board to any system. I think that any system ought to be looked at very closely to see whether those concerns about heightened scrutiny are being realized. I think that of the three Proposals, Proposal A is the most worthy of consideration. I have severe problems with B and C and I agree with Bob Weisberg's counsel that at the present time we ought to wait until the dust settles and see what happens with the new court before we consider such massive institutional change. Thanks.